EDITOR'S NOTE

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

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JAMES CAROL WILLIAMS,
Petitioner

v.

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections

Respondent

---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

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Supreme Court, U.S.
FILED
JUL 9 - 1987
JOSEPH F. SPANIOL, JR.
CLERK

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SUPREME COURT, U.S.

87-5222

IN THE SUPREME COURT
OF THE UNITED STATES

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| JAMES CAROL WILLIAMS,<br>Petitioner | § | |
| v. | § | NO. _____ |
| JAMES A. LYNAUGH,<br>Respondent | § | |

PETITIONER'S MOTION TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW James Carol Williams, Petitioner herein, and respectfully moves to proceed in forma pauperis before this Honorable Court. The undersigned counsel was appointed pursuant to the Criminal Justice Act to represent petitioner before the United States District Court for the Southern District of Texas in these proceedings.

Respectfully submitted,

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Attorney for Petitioner

Supreme Court, U.S.
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QUESTIONS PRESENTED FOR REVIEW

1. Does the inclusion for the jury's consideration during the punishment phase of a capital trial resulting in imposition of the death penalty of unadjudicated criminal conduct without cautionary instructions violate the Fourteenth and Eighth Amendments.

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## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is included in the Appendix. The Order of Dismissal of the United States District Court for the Southern District of Texas and the Memorandum and Recommendation of the United States Magistrate for the Southern District of Texas are included in the Appendix.

## JURISDICTION

The opinion of the Court of Appeals was entered on April 10, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTES

1. Vernon's Code of Criminal Procedure for the State of Texas Article 3.01:

> All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specifically defined.

2. Vernon's Code of Criminal Procedure for the State of Texas Articles 37.07 and 37.071 are included in the Appendix.

## STATEMENT OF CASE

Contrary to his plea, petitioner was convicted of capital murder in the 179th Judicial District Court of Harris County, Texas, the date of the judgment of conviction being February 6, 1978. Petitioner was sentenced to death by intravenous injection. The Texas Court of Criminal Appeals affirmed the judgment. Williams v. State, 604 S.W.2d 146 (Tx.Cr.App.



1980). On January 21, 1981, a Petition for Writ of Habeas Corpus was filed in the Texas Court of Criminal Appeals which was denied.

On January 23, 1981, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Southern District of Texas. A stay of execution was entered on January 26, 1981.

On March 31, 1986 the Magistrate entered her memorandum and recommendation. In accordance therewith, the District Judge entered a Final Judgment and Order of Dismissal on May 27, 1986.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the lower court on April 10, 1987.

Petitioner was granted leave to proceed in forma pauperis by the District Court.

A substantial portion of the State's evidence in aggravation at the punishment phase of Petitioner's trial involved the alleged commission of a robbery by Petitioner prior to the offense for which he presently stands convicted. Objection to the admission of this evidence was made by Petitioners' trial counsel, but such objection was overruled by the judge. This evidence consisted of the testimony of several witnesses as to Petitioner's alleged involvement. No evidence was presented tending to indicate that Petitioner was ever charged with or convicted of this alleged crime, nor was the jury instructed as to the use of this specific evidence.

ARGUMENT

The use of extraneous or extrinsic offenses of the accused in a criminal trial is normally forbidden in Texas practice, but for certain specified exceptions. E.g., Jones v. State, 479 S.W.2d 307 (Tx.Cr.App. 1972), n. 1. It would appear to be beyond dispute that such evidence can easily operate to the prejudice of the defendant. When the extrinsic offense has not resulted in prosecution, it would further appear to be obvious that the prejudice and unfairness are multiplied.

In the punishment stage of the trial, the rules of admission of extrinsic offenses may be relaxed, but only to a certain extent. In Texas, this has produced what can only be termed an anomaly in the sentencing procedures in capital and non-capital cases.

Vernon's Ann.C.C.P. art 37.07 (hereinafter Article 37.07) provides that evidence of a prior criminal record is admissible in the pre-sentencing phase of the trial, as well as is the general reputation and character of the accused. In Jones v. State, supra, the court determined that this however did not open the door to introduction of a specific criminal acts not the basis of a conviction as a matter of aggravation.

Despite this restriction and its foundational policy, Vernon's Ann.C.C.P. art 37.071 (hereinafter Article 37.071), concerning the sentencing procedure in a capital trial, has been interpreted by the courts of Texas to allow the introduction of such evidence. E.g., Quinones v. State, 592 S.W.2d 933 (Tx.Cr.App. 1980)(en banc). This admission is not specifically legislatively prescribed, but the language of Article 37.071 to the effect that "evidence may be presented as to any matter that the court deems relevant to sentence" has been viewed as justification for admission. In view of the focus and development of capital punishment jurisprudence over the past several years, this dichotomy in capital and non-capital sentencing procedures in Texas is nothing less than astounding. The only explicable and logical reason for exclusion in the non-capital arena is the probabilities of prejudice and unfairness to the defendant and it is these traits, inter alia, which substantial attempts to remove from the capital sentencing field have been made.

Further puzzling is the fact that Article 37.07 speaks of all criminal cases. Vernon's Ann.C.C.P. art 3.01 provides that the "unusual acceptation in common language" will be given to terms and words in the Texas Code of Criminal Procedure. "All criminal cases" would appear to be subject to no uncertain interpretation.

With this basic framework in mind, it is the position of the Petitioner that his constitutional guarantees were violated by the introduction of this type evidence during the punishment phase of his trial in various respects.

Cruel and Unusual Punishment:

It is only too simplistic to state that the issue of capital punishment is a difficult area of law. What began with a per curiam opinion in Furman v. Georgia, 408 U.S. 239 (1972), has begat many plurality opinions simply because of the many facets of decisional basis involved. What has evolved however, Petitioner submits, is an overriding interest in ensuring that a person sentenced to death deserves that fate with consideration of both aggravating and mitigating circumstances with especial interest in the latter. A mistake on the side of execution must be avoided and procedures must be scrupulously examined and refined to avoid such a result.

In Witherspoon v. Willams, 391 U.S. 510 (1968), the Court recognized that the punishment decision in the capital case ranks at or near the top of the list of jury functions in our criminal system. In Gregg v. Georgia, 428 U.S. 153, 189 (1976), Mr. Justice Stewart, speaking for the plurality, clearly indicated that "discretion [of the jury] must be suitably directed and limited so as to minimize the risk of

wholly arbitrary and capricious actions." In Woodson v. North Carolina, 428 U.S. 280 (1976), he, again for the plurality, noted a special need for reliability in the assessment of death. In Lockett v. Ohio, 438 U.S. 586 (1978), Mr. Chief Justice Burger further refined and characterized this requirement as the necessity for a higher degree of reliability than might be required in non-capital cases. In Eddings v. Oklahoma, 455 U.S. 104 (1982), Ms. Justice O'Connor, concurring, recognized that the Court had attempted to ensure that execution will not result from "whim, passion, prejudice or mistake."

The primary foundation for the judicial concern for high reliability is the recognition in Furman and the iteration and reiteration in virtually all its progeny that death is a "qualitatively different" punishment from all other criminal sanctions. Its is irreversible and erroneous imposition has no remedy. See Eddings v. Oklahoma, supra (O'Connor, J., concurring). A tight procedure as near to error free as possible is required and the allocation of risks should place the greatest burden on the state. Cf. Addington v. Texas, 441 U.S. 418 (1979). It is clearly more tolerable to allow an arguably worthy person go unexecuted than to execute one who is not so endowed.

The primary basis of the foregoing decisions has been the Eighth Amendment proscription against cruel and unusual punishment as applicable to the various states through the due process clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). However, due process considerations per se are also applicable. Gardner v. Florida, 430 U.S. 349 (1977). Both guarantees inform the instant case.

For judging the facts at bar by the standards noted above, it is first necessary to remember and look specifically at the Texas procedure for imposition of the death penalty. Article 37.071 provides a bifurcated procedure where if the defendant



is found guilty of a capital offense, those offenses being by statute specifically delineated, the same jury then considers the sentence. The jury must answer two and sometimes three special questions. If all those answers are affirmative, the court must sentence the defendant to death. Pertinent herein, the jury must determine whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071(b)(2). In Jurek v. Texas, 428 U.S. 262 (1976), this procedure overcame constitutional objection (but, it is submitted, by the barest of margins). The necessity to focus the discretion of the jury, mandated by Furman, was found in the limitation of capital crimes. The necessity to allow consideration of mitigating circumstances was read into the question quoted above although not previously so specifically interpreted in that sense by the Texas courts.

In the instant case, a significant basis of the State's contention that Petitioner "would commit criminal acts of violence" and be a "continuing threat to society" was the assertion that Petitioner had participated in a robbery prior to the offense for which he stands convicted. However, this as an act of misconduct for which Petitioner has never been tried and convicted nor was there any indication that he had ever been charged. Petitioner's alleged participation in that offense has thus never been placed to the reasonable doubt test nor was his presumption of innocence ever mentioned at trial much less pierced. Indeed, the prosecutor told the jury:

> This robbery that you heard about. You don't have to go back there and find him guilty of this case. You don't have to write a verdict for that. This is here to let you see what he did ten days prior. [ROT 696-7; T629-30]

The implication was thus that the Petitioner did commit the offense just as if he had been finally convicted of such.

The primary reason for the general rule of exclusion of such evidence is undue prejudice and unfairness which will

naturally flow from evidence of a judically untested extraneous offense. For what other basic reason would Section 37.07 keep it out of the sentencing equation in a non-capital offense. Under such circumstances, can it not be said there now exists a possibility that Petitioner stands sentenced to die based upon "mistake" or "prejudice"? Is Petitioner's sentence based on "reason" or is there a possibility of "arbitrariness and capriciousness" in the picture? Does the use of such evidence of extrinsic offenses vindicate the neccesity for "extraordinarily fair and reliable procedures" which it cannot be disputed is required in cases such as that at bar. How can a sentence of death be said to be reliable and one in which society can have faith when there is a strong possibility that it is based largely on the commission of an offense of which there may well exist a reasonble doubt as to the guilt of the accused? Does this procedure strive toward the goal of the Supreme Court for an error-free sentence? Most compelling, is the risk of mistake allocated to the state by such a procedure or must it fall on the shoulders of the one who is to die? Petitioner submits that the answers to these various questions are obvious. The use of extraneous offenses as a tool for punishment falls far short of working toward the goals established and taught during the past decade and a half in the area of capital punishment.

The creation of the standard in the Texas statute, as exemplified by the question which the jury must answer, does not exist in a vacuum. Evidence must be used to establish that standard. Those items of evidence may themselves be unreliable, arbitrary, et al., which can only lead to a sentence bearing those attributes. Therefore, even though the statute itself may be facially constitutional, all procedures used within that statute must be scrutinized through constitutional glasses before it can be said that constitutional ideals are satisfied.



The mere setting of a punishment standard by statute and the rote reading of such to the jury may well not be sufficient to pass constitutional tests. Error may nevertheless lie in "[t]he standardless and unchanneled imposition of death sentences and the uncontrolled discretion of a basically uninstructed jury." Godfrey v. Georgia, 446 U.S. 420, 429 (1980) (plurality opinion). Abuse must be avoided by use of instructions. In the Texas context, this must be especially examined inasmuch as the matters of aggravation of sentence are not as specific as those approved in, for example Gregg v. Georgia, supra, and Proffitt v. Florida, 428 U.S. 242 (1976). See Jurek v. Texas, supra at 270. Evidentiary aggravation in this evidentiary context is a relatively untested area, inasmuch as the aggravation which the Supreme Court concerned itself in Jurek was that exemplified by the categories of murder which Texas deems capital and not the statutorily undefined items of evidence of aggravation used to establish an ultimate standard for punishment. However, the Supreme Court in Smith v. Estelle, 451 U.S. 454 (1981), established that those evidentiary details are subject themselves to constitutional inquiry.

In the Texas procedure, these items of evidence should be subject to the "specific and detailed guidance" provided to the jury required of the statutory forms of aggravation. Godfrey v. Georgia, supra at 428. Anything less fails to serve the purpose of extraordinary reliability in the imposition of the death penalty.

Due Process:

Considerations of due process clearly enter the decision-making process of the jury. This is probably best exemplified by the fact that standard of proof by which a jury measures the evidence are themselves to be measured by the priciples of due process. Addington v. Texas, supra. In this respect, the standard of reasonble doubt has been held to be

guaranteed by the due process clause to a criminal accused. In re Winship, 397 U.S. 358 (1970).

However, careful analysis of the Addington and Winship opinions reveals that the considerations of due process do not touch only the abstract standard of proof but also the evidence which is used to meet that standard by the party shouldering the burden. In Winship, supra at 362, Mr. Justice Brennan quoted with approval the following language of Brinegar v. United States, 338 U.S. 160, 174 (1949):

> Guilt in a criminal case must be proved beyond a reasonble doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property. [emphasis supplied].

The words of Mr. Justice Harlan, in concurrence in Winship are equally compelling to the effect that "[i]n a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." In re Winship, supra at 372. Appellant thus respectfully submits that the rules of evidence and procedure such as that which allows the introduction of an extraneous offense into the jury's consideration herein, may contravene principles of due process and must be judged accordingly

In assessing the constitutional validity of a rule of evidence, the interest of the defendant and those of the state must be weighed. In this process, the words of Mr. Justice Harlan noted above cannot be forgotten. Furthermore, in this balancing act, equality is not the benchmark. Indeed:

> In a criminal ~~case~~ . . . the interests of the defendant are of such magnitude that historically and without an explicit constitutional requirement they have been protected by standards of proof designed to excluded as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. [Addington v. Texas, supra at 423-4 (footnote omitted) (emphasis supplied)]



Furthermore, the interests of society are at stake.

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. [In re Winship, supra at 364.]

When assessed in these lights, it is respectfully submitted that the Texas practice of allowing evidence of alleged criminal conduct not amounting to conviction to be used in aggravation in the sentencing phase of a capital trial cannot stand. The gravity of the decision, and the relative importance attached thereto cannot be overemphasized. If one point can be made from the wrestling of the Supreme Court with the capital punishment question over the past several years, it is that the death decision is the most grave in our criminal justice system and when one is sentenced to execution, it must be a well founded and individualized decision not based upon supposition, innuendo or chance. Mr. Chief Justice Rehnquist would demand "accuracy of the fact finding process and . . . fairness of the sentencing procedure where the death penalty is imposed." Woodson v. North Carolina, supra at 323 (Rehnquist, J., concurring).

In Burgett v. Texas, 389 U.S. 109 (1967) the Court forbade the use of a criminal conviction obtained in apparent violation of one's right to counsel to be used "either to support guilt or enhance punishment for another offense." Id. at 115. To do so worked an erosion of that right to counsel. Accord Loper v. Beto, 405 U.S. 473 (1972). This should be of even greater significance when the punishment is death.

Herein, it is submitted, is an even more egregious situation than present in Burgett in that misconduct not even amounting to a conviction is involved. The Petitioner is

clearly clothed with the presumption of innocence relative to that misconduct and constitutionally protected by the standard of reasonble doubt before suffering directly therefrom. There certainly exists no viable reason why he should suffer any collateral detriment especially when that detriment is death. Again, the prevailing standard in the due process analysis is reliability, a standard particularly compelling in the capital case, and query how reliable the evidence as presented to the jury herein can be. Gilday v Scafati, 428 F.2d 1027, 1029 (1st Cir.1970) (cited with approval in Loper v. Beto, supra).

Equal Protection:

Turning now to other constitutional protections, Article 37.07 provides for the introduction of a defendant's past criminal record in aggravation of sentence. Acts not resulting in a final conviction are inadmissible under this provision as discussed previously. On the opposite hand, Article 37.071 has been interpreted to allow the introduction of extrinsic offenses in capital cases. Clearly the State has placed the capital defendant in a disadvantageous position. Such a scheme is violative of the right to equal protection of the laws guaranteed by the Fourteenth Amendment.

Appellant does not contest the general right of a state to provide statutory classifications with differing treatments. However, such must bear a rational relationship to a legitimate state interest and furthermore the classification must be reasonable and not arbitrary and capricious. E.g., Loving v. Virginia, 388 U.S. 1 (1967). The State bears the burden of showing its interest and the rational relationship to the classification. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973). In the classification at issue, Petitioner submits there exists no set of facts which could either establish any state interest or illustrate any rational relationship if there was such an interest. Indeed, the classification itself is patently arbitrary and capricious in treating one class of



persons convicted of crime differently from another.

Equal protection problems also exist if one looks only at Article 37.07. On its face, this applies to all criminal cases which implies equality of treatment. However, facial validity if unequally applied in practice is unconstitutional. E.g., Ziegler v. Jackson, 638 F.2d 776 (5th Cir. 1981). Herein, Article 37.07 has been construed as inapplicable to a capital defendant. This suffers then from the same equal protection infirmities as the 37.07/37.071 dichotomy discussed supra.

CONCLUSION

It is respectfully submitted that the issue presented herein is one greatly impacting upon the efforts of this Honorable Court over the past fifteen years to craft and insure a constitutionally valid system of capital punishment. The use of unadjudicated offenses as a basis for the imposition of the death penalty works significant violence to those efforts. The granting of a writ of certiorari is respectfully requested.

Respectfully submitted,

By: Michael C. Farrow

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari was served upon Robert S. Walt, Assistant Attorney General, State of Texas, P.O. Box 12548, Capital Station, Austin, Texas 78711 on this 9th day of July, 1987.

Michael C. Farrow

**James Carol WILLIAMS,**
**Petitioner-Appellant,**

**v.**

**James A. LYNAUGH, Director, Texas Department of Corrections,**
**Respondent-Appellee.**

**No. 86-2480.**

United States Court of Appeals,
Fifth Circuit.

April 10, 1987.

Petitioner, who was convicted of murder and sentenced to death, filed application for writ of habeas corpus and motion for stay of execution. The United States District Court for the Southern District of Texas, Gabrielle K. McDonald, J., dismissed. Petitioner appealed. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that: (1) admission of unadjudicated offenses in sentencing phase of petitioner's capital trial did not violate the Eighth and Fourteenth Amendments; (2) rational basis test was appropriate level of scrutiny for determining whether the Texas capital sentencing procedure violated the equal protection clause; and (3) the Texas capital sentencing procedure did not violate the equal protection clause.

Affirmed and stay of execution vacated.

**1. Constitutional Law ⇐270(4)**
**Criminal Law ⇐1213.7**

Admission of unadjudicated offenses in sentencing phase of defendant's capital trial did not violate defendant's Eighth and Fourteenth Amendment rights; evidence of these unadjudicated crimes was clearly relevant to the jury's task of determining whether there was probability that defendant would continue to commit acts of violence that would constitute continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071; U.S.C.A. Const.Amends. 8, 14.

**2. Constitutional Law ⇐270(1)**

Defendant sentenced to death for murder was not entitled to stricter interpretation of due process. U.S.C.A. Const. Amend. 14.

**3. Constitutional Law ⇐250.3(1)**

Rational basis test was appropriate level of scrutiny for determining whether the Texas capital sentencing procedure violated the equal protection clause; capital defendants are not suspect class for equal protection purposes. U.S.C.A. Const. Amend. 14; Vernon's Ann.Texas C.C.P. art. 37.071.

**4. Constitutional Law ⇐213.1(2)**

Rational basis scrutiny requires only that legislative classification rationally promote legitimate governmental objective; this standard is offended only if classification rests on grounds wholly irrelevant to achievement of state's objective.

**5. Constitutional Law ⇐250.3(1)**
**Criminal Law ⇐1206.1(2)**

Texas capital sentencing procedure, which allows introduction of unadjudicated offenses in capital sentencing trials even though Texas does not allow such evidence in noncapital cases, did not violate equal protection clause; Texas has strong interest in ensuring that all relevant evidence concerning capital defendant is placed before jury in sentencing phase, and purpose of allowing evidence of unadjudicated offenses to be considered in sentencing phase is to assist jury in determining whether defendant is likely to be continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071; U.S.C.A. Const.Amend. 14.

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Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GARWOOD and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

Petitioner James Williams appeals the district court's dismissal of his petition for a writ of habeas corpus. After considering Williams' arguments, we affirm the judgment of the district court and vacate the stay of execution entered by the district court pending this appeal.

I.

Williams was convicted of killing Mohamad Youssef Awada. Since the murder was committed while robbing Awada, Williams was charged with a capital murder under Texas law. *See* Tex. Penal Code Ann. § 19.03(a)(2).[1] After the punishment phase hearing the jury answered affirmatively the special issues submitted to them.[2] Accordingly, Williams was sentenced to

1. Under Texas law the following offenses are defined as capital murders:
   (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
   (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;
   (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
   (4) the person commits the murder while escaping or attempting to escape from a penal institution;
   (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution; or
   (6) the person murders more than one person:
   (A) during the same criminal transaction; or
   (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.
   Tex.Penal Code Ann. § 19.03 (Vernon Supp. 1987).

2. After finding a defendant guilty of capital murder, the jury is required to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of a capital murder offense. The jury must decide:
   (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
   (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
   (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
   If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, the death sentence is imposed. If the jury finds that the answer to any question is no or that it is unable to answer any question, a sentence of life imprisonment results.
   Tex.Code Crim.Proc.Ann. art. 37.071 (Vernon Supp.1987).

death. Williams' conviction was affirmed by the Texas Court of Criminal Appeals. *Williams v. State*, 604 S.W.2d 146 (Tex.Crim.App.1980) (en banc). After exhausting his state remedies, Williams filed an application for a writ of habeas corpus and a motion for a stay of execution in federal district court. The district court granted the stay of execution on January 26, 1981. On January 8, 1986, an evidentiary hearing was held before the magistrate. The magistrate rejected each of Williams' claims and recommended that his petition for habeas corpus be dismissed. The district court adopted the opinion of the magistrate and entered an order on May 27, 1986, dismissing Williams' petition. On August 1, 1986, the district court granted Williams a certificate of probable cause as well as permission to proceed in forma pauperis. The district court also continued the stay of execution pending the disposition of this appeal.

II.

Williams first contends that the evidence of unadjudicated criminal conduct submitted to the jury at the punishment phase of the trial violates the eighth and fourteenth amendments. Williams also asserts that the equal protection clause of the fourteenth amendment is violated because Texas allows for the introduction of unadjudicated offenses in capital sentencing trials but not in noncapital cases. We discuss the merits of each contention in turn.

A.

[1] In the punishment phase of Williams' trial, evidence was introduced regarding Williams' participation in an armed robbery of a restaurant less than two weeks prior to the time he murdered Awada.[3] Williams contends that because there was no evidence that he was either charged or convicted for the offense, such evidence lacks reliability and results in an arbitrary imposition of the death penalty in violation of the eighth and fourteenth amendments. We disagree.

We have already rejected the argument advanced by Williams in *Milton v. Procunier*, 744 F.2d 1091 (5th Cir.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985). In *Milton* the state put evidence of unadjudicated criminal conduct before the jury during the punishment phase of a capital trial. We rejected the contention of the habeas petitioner that the admission of this evidence violated his rights under the fifth, sixth, eighth, and fourteenth amendments. *Id.* at 1093, 1097. We noted that under the structure of the Texas death penalty system, a jury must find that a murder was committed under one of the circumstances defined in Tex.Penal Code Ann. § 19.03(a) before it considers whether to impose the death penalty. *Id.* at 1097 n. 5 (quoting *Autry v. Estelle*, 706 F.2d 1394, 1406 n. 5 (5th Cir.1983), *cert. denied*, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984)). We concluded that the structure of the Texas death penalty system and the admission of unadjudicated criminal conduct during the punishment phase "in no way undermines the constitutionally mandated procedures set forth by the Supreme Court in *Jurek [v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)], and [*Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)]." *Id.*

3. Three witnesses testified during the punishment phase about Williams' participation in the robbery at the restaurant. Two of the witnesses, Leon Dobbins and Samuel Byrd, positively identified Williams as one of the four armed robbers in question. The record does not indicate that Williams was ever charged with this robbery.



We emphasize that evidence of Williams' extraneous unadjudicated offense was not allowed to be introduced until the punishment phase and thus eliminates any concern that the jury used this unadjudicated offense to influence its decision in the guilt phase of the trial. The focus of the Texas capital sentencing procedure is to have all the relevant evidence before the jury when answering the special issues which determine whether the death penalty will be imposed. *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958. Acknowledging society's reservations about the use of wrongdoing not then being tried, we stated in *Milton* that these concerns "are addressed by properly applied standards of relevance and sufficiency of proof." 744 F.2d at 1097.[4] As Justice Stevens said in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983):

> [T]he Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating circumstances or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime ... What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

463 U.S. at 967, 103 S.Ct. at 3433 (Stevens, J., joined by Powell, J., concurring in the judgment) (quoting in part *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 3440, 77 L.Ed.2d 235 (1983) (emphasis added by *Zant*)) (citations omitted).

[2] Evidence of these unadjudicated crimes is clearly relevant to the jury's task of determining whether there is a probability that Williams would continue to commit acts of violence as required by special question two. Consistent with our decision in *Milton*, we hold that the admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments.[5]

B.

Williams also alleges that because Texas allows for the introduction of unadjudicated offenses in capital sentencing trials but does not allow such evidence in noncapital cases, the Texas capital sentencing procedure violates the equal protection clause of the fourteenth amendment. We reject this argument.

[3] Our first task in an equal protection challenge is to identify the level of scrutiny that must be used. Williams' complaint is that capital defendants are treated differently from noncapital defendants. We

4. We note that Tex.Code Crim.Pro.Ann. art. 37.071(a) provides that the jury may not use evidence in the punishment phase which violates either the federal or state constitution. Furthermore, Texas decisions have uniformly approved the admission of unadjudicated offenses. *See, e.g., Rumbaugh v. State*, 629 S.W.2d 747, 754 (Tex.Crim.App.1982) (en banc); *Milton v. State*, 599 S.W.2d 824, 827 (Tex.Crim.App.) (en banc), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1980).

5. Williams also asserts that he is entitled to a stricter interpretation of due process because he has been sentenced to death. We have already rejected this argument. *Buss v. Estelle*, 696 F.2d 1154, 1157 n. 2, *modified on petition for rehg.* 705 F.2d 121 (5th Cir.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983).

agree with Williams that the rational basis test should be used to test Texas' sentencing procedure; we have already held that capital defendants are not a suspect class for equal protection purposes. *Gray v. Lucas*, 677 F.2d 1086, 1104 (5th Cir.1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983).

[4, 5] Rational basis scrutiny requires only that the legislative classification rationally promote a legitimate governmental objective. *Arceneaux v. Treen*, 671 F.2d 128, 131 (5th Cir.1982). This constitutional standard is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *Id.* at 132 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)). We believe that Texas' capital sentencing procedure passes constitutional muster under the rational basis standard. The purpose of allowing evidence of nonadjudicated offenses to be considered in the sentencing phase is to assist the jury in determining whether the defendant is likely to be a continuing threat to society. This evidence helps focus the jury on the particular circumstances of the individual offense and the individual offender. *Jurek*, 428 U.S. at 273, 96 S.Ct. at 2957. Given the finality of a death sentence, Texas has a strong interest in ensuring that all relevant evidence concerning the capital defendant is placed before the jury so that it can consider the evidence when answering the special issues. In furthering this interest, the state could rationally decide that different procedures should be used for capital defendants than for noncapital defendants. Consequently, we reject Williams' assertion that Texas' capital sentencing procedures violates the equal protection clause of the fourteenth amendment.

III.

Finding all of Williams' claims to be without merit, the judgment of the district court dismissing Williams' habeas petition is AFFIRMED and the stay of execution issued by the district court is VACATED.

AFFIRMED; STAY OF EXECUTION VACATED.

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sentence pronounced on Monday, and defendant was present when verdict was received and when sentence was pronounced, judgment and sentence were valid. Ex parte Gibson (1899) 127 Cr.R. 73, 138 S.W.2d 296.

3. Misdemeanors

In a misdemeanor case the defendant's presence is not essential. Ciuga v. State (1930) 9 Cr.R. 369; Mapes v. State (1933) 13 Cr.R. 85.

In misdemeanor case in which a jail penalty is part of the punishment, it is not necessary that defendant be present when the verdict is received. Booher v. State (1916) 80 Cr.R. 72, 180 S.W. 977.

4. Voluntary absence

Verdict could be received in felony case when defendant was absent from the courtroom of her own volition. Hadley v. State (1984) 163 Cr.R. 571, 296 S.W.2d 717.

When a defendant voluntarily absents himself after entering a plea to the indictment, the trial may proceed to its conclusion. Gonzales v. State (Cr.App.1974) 515 S.W.2d 930.

Defendant, who was free on bail, who was present in court during selection of the jury and entered a plea of not guilty, who failed to appear in court the next morning and who was found to have voluntarily absented himself from trial, waived his right to be personally present at trial and, thus, the court did not err in proceeding with the trial in his absence. Id.

## Art. 37.07. [603] [770] [750] Verdict must be general; separate hearing on proper punishment

Section 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) Except as provided in Article 37.071, if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in any criminal action where the jury may recommend probation and the defendant filed his sworn motion for probation before the trial began, and (2) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall

be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(c) Punishment shall be assessed on each count on which a finding of guilty has been returned.

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(d) When the judge assesses the punishment, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.

(e) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

Acts 1965, 59th Leg., vol. 2, p. 817, ch. 722. Amended by Acts 1967, 60th Leg., p. 1739, ch. 659, § 22, eff. Aug. 28, 1967; Acts 1973, 63rd Leg., p. 968, ch. 399, § 2(A), eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1126, ch. 426, art. 3, § 2, eff. June 14, 1973.

**Historical Note**

The 1967 amendment rewrote this article, which prior thereto read:

"1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find, it must say in its verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, it must find that the defendant is either guilty or not guilty.

"2. Alternate procedure.

"(a) In felony cases less than capital and in capital cases where the State has made it known that it will not seek the death penalty, and where the plea is not guilty,





charge at guilt stage and prior to testimony purportedly raising such issue and which was not resurged at penalty stage of trial, was premature. Mosley v. State (Cr.App. 1978) 566 S.W.2d 943.

In burglary prosecution with intent to commit theft, instructing jury to determine whether defendant was the same person previously convicted in causes alleged for enhancement was not reversible error for failure to include the penalty for primary offense in that charge, even though it would have been better practice to have submitted the possible punishment for primary offense, where eventuality that defendant was not the person convicted in two causes alleged for enhancement did not arise. Byrd v. State (Cr.App.1978) 491 S.W.2d 440.

Where court's charge limited jury's finding to only those prior felony convictions alleged in indictment, evidence of two prior convictions of defendant which had not been alleged in the indictment was not inadmissible on ground that jury might have found the two convictions alleged in the indictment to be bad and have based their verdict on the two convictions not alleged in the indictment and that such would have constituted a variance between indictment and proof. White v. State (Cr.App.1973) 500 S.W.2d 523.

It was error, at punishment stage, to instruct jury to find truth or falsity of each of two prior felonies without additional instruction on punishment alternatives; however, error did not require reversal where there were no contested fact issues and evidence fully established allegations of the two prior convictions and defendant offered no evidence and waived final arguments. Kennerbrew v. State (Cr.App.1979) 578 S.W.2d 391.

**880. —— Extraneous offenses, instructions, punishment**

Charge given at punishment phase of trial was sufficient and fully protected rights of defendant even though it did not state that jury could not consider evidence relating to an extraneous offense in determining punishment where charge at punishment phase incorporated by reference charge given at guilt-innocence phase and charge given at guilt-innocence phase limited jury's consideration of evidence concerning the extraneous offense to determination of identity. Henriksen v. State (Cr.App.1978) 566 S.W.2d 931.

**891. —— Review, instructions, punishment**

Where no special request for charge was made nor was there an objection to court's charge which informed jury that death was an applicable penalty to offense of robbery by assault with firearm although state had waived death penalty in writing, there was nothing before Court of Criminal Appeals for review. Black v. State (Cr.App.1968) 439 S.W.2d 951.

Where no special request for charge was filed nor was there objection to trial court's charge which informed jury at guilt stage of proceedings as to penalty provided by law for offense of burglary of coin-operated machine, nothing was presented to Court of Criminal Appeals for review. Baity v. State (Cr.App.1970) 455 S.W.2d 301, certiorari denied 91 S.Ct. 180, 400 U.S. 913, 27 L.Ed.2d 150.

On appeal in proceeding in which defendant had been convicted, at a joint trial, of two separate aggravated robbery offenses involving the same criminal episode, it would not be presumed that defendant was harmed due to fact that jury was instructed during the punishment phase that the sentences on both charges would run concurrently. Halliburton v. State (Cr.App. 1979) 578 S.W.2d 736.

## Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Con-

stitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Added by Acts 1973, 63rd Leg., p. 1125, ch. 426, art. 3, § 1, eff. June 14, 1973.

**Cross References**

Capital murder, see V.T.C.A.Penal Code, § 19.03.
Execution of convict, see art. 43.14.
Punishment for capital felony, see V.T.C.A.Penal Code, § 12.31.



CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 31 1986
JESSE E. CLARK, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| JAMES CAROL WILLIAMS | § | |
| | § | |
| PETITIONER | § | |
| | § | |
| V. | § | CIVIL ACTION NO. H-81-180 |
| | § | |
| O. L. McCOTTER | § | |
| | § | |
| RESPONDENT | § | |

MEMORANDUM AND RECOMMENDATION

Petitioner, an inmate incarcerated in the Texas Department of Corrections (TDC), filed this application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 challenging his 1978 conviction and sentence from Harris County for capital murder. Because this Court finds no constitutional infirmity regarding the conviction or sentence, it is hereby RECOMMENDED that this application be DENIED and a stay of execution be VACATED.

On August 25, 1977, petitioner, James Carol Williams, was indicted for the murder of Mohamad Youssef Awada, while in the course of committing and attempting to commit the offense of aggravated robbery in Cause No. 266219. On February 21, 1978, in the 179th Judicial District Court of Harris County, Texas, petitioner was found guilty of murder committed while robbing Awada, the attendant of a Sigmor Service Station.

APPENDIX A

After a punishment hearing, the jury affirmatively answered the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Pro. Ann. On February 22, 1978, punishment was assessed at death.

The Texas Court of Criminal Appeals affirmed the conviction on June 11, 1980. Williams v. State, 615 S.W.2d 762 (Tex.Crim.App. 1980). Petitioner did not seek a writ of certiorari in the United States Supreme Court.

Petitioner filed an application for a writ of habeas corpus in the state convicting court on January 22, 1981. On January 26, 1981, that court recommended petitioner's application be denied. On the same date, the Court of Criminal Appeals denied petitioner's application for a writ of habeas corpus and denied his application for a stay of execution.[1]

Petitioner filed this petition on January 23, 1981; this Court granted a stay of execution on January 26, pending further order of the Court.

Petitioner has alleged the following grounds for relief:

1) His death sentence is a cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution of the United States and deprives him of due process of law and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States for each of the following reasons:

a) The present Texas death penalty procedures, as applied since their enactment in 1973, have resulted in

[1] Williams' execution was originally scheduled for January 28, 1981.



arbitrary capricious and patently unjust imposition of the death penalty, and were applied to sentence this petitioner to death in an arbitrary and invidious manner that is shocking to the conscious of the Court charged with the obligation to enforce Eighth and Fourteenth Amendment principles. [sic]

b) Under the present Texas death penalty procedures, the death penalty is discriminatorily applied against defendants of ethnic minority extraction, impoverished defendants, and male defendants, upon the sole grounds of race, poverty and sex; and petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice.

c) The prediction of a probability of future dangerousness is required by Texas law and made in petitioner's case as the basis for imposition of the death penalty is so uncertain, vague, unreliable and prone to error on the side of over-inclusion that it fails to adequately channel the sentencing decisions of juries and is arbitrary.

d) The finding of petitioner's future dangerousness was based upon an inadequate inquiry and insubstantial evidence, with the result that the procedure used to sentence him to die failed to provide a reliable determination of the appropriateness of the death sentence in this specific case.

2) The evidentiary inclusion for the jury's consideration as to the appropriateness of the death penalty for the petitioner have uncharged criminal misconduct not previously

. . . adjudicated was violative of the principles of due process and equal protection as well as the Eighth Amendment.

3) The death sentence such as imposed upon petitioner in and of itself is cruel and unusual punishment forbidden by the Eighth Amendment and deprives petitioner of due process of law and equal protection.

Petitioner's Response in Compliance with Order of Court, p. 1-2, Document #30.

The respondent has answered and filed a Motion for Summary Judgment. Therein, respondent concedes or waives exhaustion of all claims.

On January 8, 1986, the Court conducted an evidentiary hearing on the merits of this application.[2]

Pursuant to Article 37.071, Tex. Code Crim. Pro. Ann., when a defendant is convicted of a capital offense the trial court then conducts a separate proceeding before the same jury on the issue of punishment. Therein, relevant evidence is produced by either side. The jury then must answer two (or three where appropriate) questions which will determine whether the death sentence will be imposed.[3]

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2 This case was referred to the undersigned judge for appropriate disposition in accordance with 28 U.S.C. §636(b) and Rule 8 of the Rules Governing 28 U.S.C. §2254 Cases.

3 Procedure in Capital Case: (a) Upon a finding that the defendant is guilty of a capital offense, the Court shall conduct the separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence. This subsection shall



. . . Petitioner challenges the constitutionality of the Texas capital sentencing procedures on the basis of the Eighth and Fourteenth Amendments. The Supreme Court, however, in Jurek v. Texas, 428 U.S. 262 (1976) has foreclosed the general issue petitioner advances. Specifically finding that the Texas capital sentencing procedures are constitutional, the Court held that:

> By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with state-wide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed it does not violate the Constitution.

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not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. (b) On conclusion of the presentation of the evidence, the Court shall submit the following three issues to the jury: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Pro. Ann. art. 37.071(a)(b).

428 U.S. at 276.

Thus, the Texas capital sentencing procedure on its face withstands petitioner's challenge.

Petitioner further claims that "the Texas death penalty is discriminatorily applied against defendants of ethnic minority extraction, impoverished defendants, and male defendants, upon the sole grounds of race, poverty and sex; and petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice." The only evidence petitioner offers to substantiate this point is an affidavit from a law professor who stated that in his opinion there is strong reason to believe that "the race of the victim played a causal role in determinining which capital homicide defendants were sentenced to death in Harris County, Texas, in the period from 1975 through 1980. Definitive proof on this issue, however, would require additional information on the charging practices of Harris County District Attorney's Office and on the circumstances and the histories of the capital homicide prosecutions by that office from the period of 1975 through 1980."[4]

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[4] This affidavit, attached to petitioner's response to the respondent's Motion for Summary Judgment, was that of Samuel R. Gross, Acting Associate Professor of Law at Stanford University, who specializes in the use of social, scientific, and statistical data in litigation.



This evidence adds little to petitioner's conclusory allegations and does not constitute the proof required for this type of claim. In Smith v. Balkcom, 660 F.2d 573, 585 (5th Cir. 1981), cert. denied 459 U.S. 882 (1982), the Fifth Circuit held that:

> In the absence of proof of some specific act or acts evidencing intentional or purposeful...discrimination against [the petitioner] on the basis of sex, race, or wealth, a petitioner is not entitled to habeas relief.

See also, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

Clearly, the evidence introduced here does not carry the requisite burden of proving intentional discrimination against petitioner in this particular case. The only evidence offered is conclusory and uncertain which does not entitle petitioner to relief. See also, Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984).

Further, petitioner asserts that the prediction of a probability of "future dangerousness", required by Texas law and made the basis for the imposition of the death penalty in this case, is so uncertain, vague, unreliable, and prone to error on the side of overinclusion that the prediction is arbitrary and fails to adequately channel the sentencing decisions of the jury.

As the respondent correctly contends, this argument was expressly rejected by the Supreme Court in Jurek v. Texas, 428 U.S. 262 (1976). The Court recognized that, although it is not easy to predict future behavior,

> the fact that such a determination is difficult, however, does not mean that it cannot be made...The task a Texas jury must perform in answering the statutory question [of future dangerousness] is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

428 U.S. at 274-276; See also, Barefoot v. Estelle, 463 U.S. 880 (1983).

In a related argument, petitioner claims that the finding of his future dangerousness was based upon "inadequate inquiry and insubstantial evidence, with the result that the procedure used to sentence him to die failed to provide a reliable determination of the appropriateness of the death sentence in this specific case." In other words, petitioner claims there was insufficient evidence for the jury to make a finding as to his future dangerousness under Tex. Code Crim. Pro. Ann. art. 37.071. The appropriate standard for reviewing sufficiency of the evidence claims in a collateral attack upon a state criminal proceeding is:



> The applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

O'Bryan v. Estelle, 714 F.2d 365, 386 (5th Cir. 1983).

In the instant case, all of the evidence presented at the guilt-innocent stage was before the jury at sentencing. In regard to future dangerousness, the state presented substantial evidence at the punishment phase that petitioner was an active participant in an armed robbery which occurred at a restaurant less than two weeks before the murder. Additional testimony was given from five Houston police officers, stationed in petitioner's neighborhood, that petitioner's reputation as a peaceful and law-abiding citizen was bad. Given this evidence, petitioner cannot prevail on this point. Indeed, in O'Bryan no additional evidence was presented at all during the punishment phase. The Fifth Circuit concluded that the evidence presented during the guilty phase of the trial itself proved sufficient to support the jury's finding. Id. at 386.

Next, petitioner claims that the inclusion for the jury's consideration at the punishment phase of previous unadjudicated criminal conduct violated his Fourteenth Amendment rights of due process and equal protection and was in contravention of the Eighth Amendment. During the punishment phase of the trial, three witnesses testified about an armed robbery at a restaurant near the Sigmor station which occurred less than two

weeks prior to the murder. Two of the witnesses, Leon Dobbins and Samuel Byrd, positively identified petitioner as one of the [illegible] petitioner was then charged with this restaurant robbery.

As noted, the capital sentencing procedure in Texas provides that;

> in the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas.

Texas courts have repeatedly held that this language does not limit evidence of relevant extraneous offenses to final convictions. Milton v. State, 599 S.W.2d 824 (Tex.Crim.App. 1980); Williams v. State, 622 S.W.2d 116 (Tex.Crim.App. 1981) cert. denied, 455 U.S. 1008. Moreover, the Fifth Circuit has held in a similar case that admission of unadjudicated extraneous offenses into evidence at the sentencing phase of a capital murder trial was not error. Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984).

The Court has also noted that "while the admission of evidence of an extraneous offense in the second phase of a Texas bifurcated proceeding must be watched closely and may implicate other constitutional concerns,...it in no way undermines the constitutionally mandated procedures for imposition of a death sentence set forth by the Supreme Court in Jurek and the other



1976 decisions. Texas decisions have uniformly approved the admission of extraneous offenses at the sentencing phase." Autry v. Estelle, 706 F.2d 1394, 1406 n. 5 (5th Cir. 1983) (citations omitted).

Moreover, the Supreme Court in Jurek has underscored the importance of the "jury having before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, supra at 2275. Therefore, petitioner's contention on this point is without merit.

Finally, petitioner claims that the death sentence is per se cruel and unusual punishment and deprives petitioner of his Fourteenth Amendment rights of due process and equal protection. The Supreme Court has expressly ruled otherwise and thus petitioner's final claim is without merit. See Gregg v. Georgia, 428 U.S. 153 (1976).

Moreover, this Court has independently reviewed the entire state court record and sees no error.

Based on the foregoing, it is hereby RECOMMENDED that this petition for a writ of habeas corpus be DISMISSED and that the stay of execution be lifted.

The Clerk will file this instrument and forthwith mail a copy to all parties. Within ten days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. §636(b)(1)(C); failure to file objections within such period shall bar an aggrieved party from attacking factual findings on

appeal. The original of any written objections shall be filed with the U.S. District Clerk, P. O. Box 61010, Houston, Texas 77208; copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, P. O. Box 61252, Houston, Texas 77208.

DONE at Houston, Texas, this the 31 day of March, 1986.

KAREN K. BROWN
UNITED STATES MAGISTRATE



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAY 27 1986
JESSE E. CLARK, CLERK
BY DEPUTY

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| JAMES CAROL WILLIAMS | § | |
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| Petitioner | § | |
| | § | |
| V. | § | CIVIL ACTION NO. H-81-180 |
| | § | |
| O. L. McCOTTER | § | |
| | § | |
| Respondent | § | |

FINAL JUDGMENT

For the reasons stated in this Court's Order of Dismissal, it is the opinion of this Court that this action should be and is hereby DISMISSED.

This is a FINAL JUDGMENT.

The Clerk shall file this Final Judgment and provide all parties with a true copy.

DONE at Houston, Texas, this the 27 day of May, 1986.

UNITED STATES DISTRICT JUDGE